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No. 03-931

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

JOE ELTON NIXON,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE*

In 1985, Respondent Joe Elton Nixon was tried in a Leon County, Florida court for the first-degree murder of Ms. Jeanne Bickner. He was tried *in absentia* after he removed his clothes and refused to enter the courtroom. The trial judge examined him, stripped to his underwear and seated on a toilet in the holding cell, and found that he had voluntarily waived attendance at trial.[1] Although

* Throughout this document, citations to the record compiled below are in the same format as on the most recent appeal to the Supreme Court of Florida. "R." designates 12 volumes of record, numbered pages 1-2104; "3.850 R." designates 23 volumes of record, numbered pages 1-4393; and "A." designates an Appendix subsequently submitted by Nixon.

[1] The Florida Supreme Court explained:

> On July 8 and 9, 1985, Nixon refused to be present during a hearing on various pretrial motions. In both instances counsel waived Nixon's presence for the limited purpose of hear-

the prosecution had earlier sought "unsuccessfully, because of defense counsel's objection" to have Nixon evaluated psychiatrically to determine his competency to be tried,[2] neither party requested a hearing on Nixon's

ing the motions. Although Nixon was present at the commencement of jury selection on July 15, 1985, as voir dire continued on the morning of July 16, 1985, Nixon refused to enter the courtroom. Defense counsel explained to the judge that Nixon had disrobed to his underwear, and was demanding a black judge and a black attorney, and did not wish to return to the courtroom. After a recess, Nixon still refused to attend the trial. The trial judge then inquired of the bailiff as to why Nixon had not returned. The judge was informed that Nixon had told another officer that he was not going to court 'for them to railroad me.' Defense counsel informed the judge that Florida Rule of Criminal Procedure 3.180(b) allowed a defendant to voluntarily absent himself from the courtroom if the court chose to try Nixon in absentia. The trial court conducted a hearing in the holding cell to determine if it would be in Nixon's best interest to allow him to absent himself from the proceedings. During the hearing, Nixon was clad only in his underwear. He reiterated to the judge that he did not wish to return to the courtroom, that he wanted another attorney and wanted to return to the jail-house. Nixon threatened that if forced to return to the courtroom, 'I still [sic] run my mouth and speak when I get ready unless you tape it up.' Nixon repeatedly stated that he wanted to return to the jail-house and did not care if the trial proceeded without him. After questioning the officer who had transported Nixon from the jail to the holding cell concerning the events leading up to appellant's removal of his clothes and desire to return to the jail-house, the trial court indicated that if Nixon did not return to the courtroom that afternoon, the court would consider his decision 'to be a knowledgeable, voluntary and intelligent waiver of his right to be present during the course of the trial.' When Nixon refused to return to the courtroom that afternoon, the court found that Nixon had knowingly, intelligently, and voluntarily waived his attendance and that the proceedings would continue without him.

Nixon v. State, 572 So. 2d 1336, 1341 (Fla. 1990).

[2] At a pre-trial conference on February 28, 1985, the prosecutor requested a determination of Nixon's competency to be tried, saying

competency to absent himself from trial, and the court did not address that issue.[3]

Trial on Nixon's plea of not guilty therefore began and proceeded in his absence. In opening argument at the guilt phase of the trial, defense counsel Michael Corin conceded to the jury that Nixon had committed the murder with which he was charged and that this would be proved to the jury's satisfaction beyond a reasonable doubt. Corin did not contest the prosecution's case at trial in any way,[4] and in closing argument he reiterated that "the State has proved beyond a reasonable doubt each and every element of the crimes charged; first-degree premeditated murder, kidnapping, robbery, and arson." R. 641. The jury returned a verdict of guilty on all counts and, following a penalty trial from which Nixon

that "the real issue" in the case would "revolve around" Nixon's mental competency. R. 899. Defense counsel resisted, saying, "I am not going to waste the time and energy to have a client examined as to competency or insanity when I am not of the professional opinion that that is relevant." R. 900. Later in the hearing, the prosecutor again urged an examination, adverting to Nixon's aberrant behavior in an unrelated assault trial held about two weeks earlier, involving the same prosecutor, defense attorney, and judge. The judge said, "Yes. I was seeing enough that made me wonder, too," R. 910, but nevertheless declined to have Nixon examined. (During the assault trial, the judge had had Nixon examined by a psychologist for 45 minutes during the lunch break. The psychologist had reported no reason to halt the trial. In the present post-conviction proceedings, she submitted an affidavit stating that she had neither performed psychological testing nor made a formal competency evaluation of Nixon during the lunch break. *See* Affidavit of Carolyn Stimel, Ph.D.; 3.850 R. 716-17; A-315-16.)

[3] On direct appeal from Mr. Nixon's conviction and death sentence, the Florida Supreme Court upheld the trial court's factual finding that Mr. Nixon had made a voluntary waiver of his right to attend his trial. 572 So. 2d at 1342. No issue of Mr. Nixon's competency to make such a waiver was presented on the appeal.

[4] Corin did not ask a single question of most of the State's 33 witnesses. He cross-examined a few perfunctorily. After the State rested, he rested for the defense without calling a witness or making any motions. R. 609.

remained absent, recommended a death sentence. The crime was a ghastly one, and the trial judge sentenced Nixon to death.

On direct appeal, Nixon, through new counsel, contended that "he was denied effective assistance of counsel when his trial counsel, without record approval of Nixon, conceded Nixon's guilt and sought leniency." *Nixon v. State*, 572 So. 2d 1336, 1338-1339 (Fla. 1990) ["*Nixon I*"]. The Florida Supreme Court remanded the case to the trial court "for an evidentiary hearing to determine whether Nixon was informed of the strategy to concede guilt and seek leniency," *id.* at 1339, and later issued a clarifying order and a second remand in an effort to determine the relevant facts, *id.* at 1339-1340. Eventually, it gave up the effort, recognizing "the confusion resulting from our remand for these atypical proceedings" and it "decline[d] to dispose of this claim [on direct appeal] on the present state of the record which . . . [was] less than complete." *Id.* at 1340. Instead, it authorized Nixon to pursue the issue in post-conviction proceedings. *Id.*

Nixon did so, again contending that "he did not give his attorney consent to enter a guilty plea or agree to allow his attorney to undertake a trial strategy in which guilt would be admitted . . . [and] that as a result of . . . [counsel's unauthorized] comments [conceding his guilt in opening and closing argument], he was denied effective representation." *Nixon v. Singletary*, 758 So. 2d 618, 620 (Fla. 2000) ["*Nixon II*"]. The state post-conviction court rejected this claim without an evidentiary hearing, and the Florida Supreme Court then reversed. *Id.* It observed that:

> At his arraignment, Nixon entered a 'not guilty' plea. By pleading 'not guilty,' Nixon exercised his right to make a statement in open court that he intended to hold the State to strict proof beyond a reasonable doubt as to the offenses charged. *See Byrd v. United States*, 342 F.2d 939, 941 (D.C. Cir. 1965); *Licata v. State*, 81 Fla. 649, 651, 88 So. 621, 622 (1921). "Unquestionably, the constitutional right of a criminal defendant to plead 'not guilty,' or perhaps more accurately not to plead guilty, entails the obligation of his attorney to structure the trial of the case around his client's plea." *Wiley* [*v. Sowders*], 647 F.2d [642] at 650 [6th Cir. 1981]. (*Nixon II*, 758 So. 2d at 623-624.)

But, the Florida Supreme Court found, Nixon's "[trial] counsel's comments were the functional equivalent of a guilty plea." *Id.* at 624. And:

> this Court has stated that '[d]ue process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary.' *Koenig v. State*, 597 So. 2d 256, 258 (Fla.1992). *See also* Fla. R.Crim. P. 3.172. (*Nixon II*, 758 So. 2d at 624.)

Thus, "we conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy." *Id.*

A further evidentiary hearing on this issue was required because, although "the 1990 Court [on direct appeal] . . . [had e]ssentially . . . issued an invitation to Nixon to raise this issue again in his 3.850 motion," and "[i]mplicit within that invitation was that the post-conviction circuit court conduct another evidentiary hearing . . . [,] the circuit court in the present post-conviction motion refused to grant an evidentiary hearing, and this Court still does not have the answer that it has been seeking for the last eleven years." *Id.*

In handing down this ruling, the Florida Supreme Court "emphasize[d] that the Strickland standard normally applies to ineffective assistance of counsel claims." *Id.* at 622, referring to *Strickland v. Washington*, 466 U.S. 668 (1984). It said that the rule of *United States v. Cronic*, 466 U.S. 648, 654 (1984), which permits a criminal defendant to establish ineffective assistance of counsel without the inquiry into prejudice demanded by *Strickland* "only applies to the narrow spectrum of cases where the defendant was completely denied effective assistance of counsel." *Id.* Therefore,

> [t]o determine which test applies, we must first decide whether Nixon's trial counsel 'entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing.' *Cronic*, 466 U.S. at 659 . . . . Trial counsel's statements during opening and closing arguments raise a question as to whether Nixon's trial counsel did, in fact, fail to subject the State's case to meaningful adversarial testing. . . . Therefore, if Nixon can establish that he did not consent to counsel's strategy, then we would find counsel to be ineffective *per se* and *Cronic* would control. (*Id.* at 622—23.)

While remanding Nixon's case for further evidentiary hearing, the Florida Supreme Court undertook to avert litigation of the constitutional issue in other, future cases by announcing a routine procedure for Florida criminal prosecutions tried after its *Nixon II* decision (January 27, 2000): "[I]n the future, . . . if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel's strategy."[5]

[5] *Id.* at 625. The relevant passage is set out in full at page 10 *infra*.

On remand to the Circuit Court for Leon County, the post-conviction hearing judge received evidence and "[i]n essence . . . found that Nixon's failure to approve or disapprove verbally was approval of counsel's strategy." *Nixon v. State*, 857 So. 2d 172, 176 (Fla. 2003) ["*Nixon III*"]. The Florida Supreme Court, in the decision which the State now seeks to have reviewed on *certiorari*, examined the entire record, discerned "no competent, substantial evidence which establishes that Nixon *affirmatively* and *explicitly* agreed to counsel's strategy," *id.*, and therefore ordered a new trial.

SUMMARY OF ARGUMENT

This case presents no "important federal question" (Rule 10 (b), (c)) warranting *certiorari*. The decision below reaffirms an earlier ruling of the same court on the same issue, handed down in January of 2000. That was a narrow ruling to begin with, and subsequent decisions of the Florida courts have limited it to its facts. Unsurprisingly, in the four years since January of 2000, the federal aspects of that decision have affected only five cases in Florida and none anywhere else. In the future, they will almost certainly affect no cases anywhere because in Florida they have been displaced by a state-law prophylactic rule designed to keep the issue from arising and completely successful to date. The state-law prophylactic rule has become a settled drill, efficient and beneficial to the Florida courts, inimical to no one's interests and to no federal concern. It represents the kind of state-law development averting any need for federal constitutional adjudication that a federal system should encourage, not upset.

The *certiorari* petition argues that this case could be an apt vehicle for consideration of more general issues of consequence beyond Florida which need resolution by this Court. That is not so. The Florida Supreme Court

decision itself involves an admixture of state law and federal constitutional law that has no applicability outside Florida. And in its federal aspects the case involves rules for adjudicating ineffective-assistance-of-counsel claims that this Court has recently reviewed several times and settled as clearly as they can be settled, given their heavily fact-dependent character. The lower courts are having no trouble applying the rules; no need appears for the Court to revisit the area so soon.

ARGUMENT

1. The Florida Supreme Court decision immediately at issue here, decided on July 10, 2003 and reported at 857 So. 2d 172, involves nothing more than the fact-bound determination that the Circuit Court for Leon County erred in finding on the record as a whole that Joe Elton Nixon affirmatively consented to his trial lawyer's concessions of guilt in opening and closing argument. The petition for *certiorari* does not seek review of that finding. It seeks review of the legal ruling of the Florida Supreme Court on Nixon's earlier post-conviction appeal—*Nixon II*, decided on January 27, 2000 and reported at 758 So. 2d 618—which frames the factual controversy decided in the present 2003 appeal. In *Nixon II*, the Florida Supreme Court held that Nixon's rights to the effective assistance of counsel and to a trial on his plea of not guilty would be violated if, without his effective consent, his lawyer told his jury that he was guilty beyond a reasonable doubt of every element of the capital crime of first degree murder.

2. As this holding suggests, *Nixon II* was a narrow decision from the outset. Its extremely narrow compass has been confirmed by subsequent Florida decisions holding explicitly that:

- *Nixon II* does not apply when defense counsel concedes the defendant's guilt of lesser included offenses. *Atwater v. State*, 788 So. 2d 223 (Fla. 2001); *Lawrence v. State*, 831 So. 2d 121 (Fla. 2002); *Jones v. State*, 845 So. 2d 55 (Fla. 2003).
- *Nixon II* does not apply when defense counsel concedes the defendant's guilt of a subset of charges in a multiple-count indictment. *Griffin v. State*, 28 Fla. L. Weekly Supp. 723 (Fla. 2003).
- *Nixon II* does not apply when defense counsel concedes the defendant's guilt in one of several alternative theories that counsel presents to the jury. *State v. Williams*, 797 So. 2d 1235 (Fla. 2000).
- *Nixon II* does not apply when defense counsel's concessions fall short of conceding that each and every element of the offense charged has been established, so that the defendant's guilt is complete. *Thompson v. State*, 839 So. 2d 847 (Fla. App. 2003).

In light of these limitations, it is not surprising that, in the four years since *Nixon II* was decided, the Florida appellate courts have granted only one criminal defendant a new trial under the *Nixon II* ruling. *Harvey v. State*, 28 Fla. L. Weekly Supp. 513 (Fla. 2003). In four other cases—all in the Florida District Courts of Appeal—post-conviction hearings were granted to determine whether a Nixon II violation occurred, but two of these cases are probably no longer good law in the light of a subsequent decision of the Florida Supreme Court further narrowing *Nixon II*.[6]

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[6] *See Hinton v. State*, 854 So. 2d 254 (Fla. App. 2003); *Cooper v. State*, 835 So. 2d 1250 (Fla. App. 2003); *Smallwood v. State*, 809 So. 2d 56 (Fla. App. 2002); *Childers v. State*, 782 So. 2d 513 (Fla. App. 2001). The *Smallwood* and *Hinton* decisions have apparently been overruled by the later decision of the Florida Supreme Court in *Griffin*, *supra*, that *Nixon II* does not apply when counsel concedes a defendant's guilt of some counts in a multiple-count indictment.

3. As we will see in a minute, the *Nixon II* decision represents an amalgam of federal constitutional Fifth and Sixth Amendment law and ancillary Florida state procedural rules. Expanding the state-law component of this compound, the Court in *Nixon II* explicitly prescribed a routine, mandatory prophylactic procedure to be used by Florida trial courts in future situations (*i.e.*, those occurring after January 27, 2000) in which similar issues appeared to be arising:

> [I]n order to avoid similar problems in the future, we hold that if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel's strategy. . . . This will ensure that the defendant has in fact intelligently and voluntarily consented to counsel's strategy of conceding guilt.

Nixon, 758 So. 2d at 624-25. Thus, in the narrow class of cases to which *Nixon II* potentially applies, the procedure to be followed has been specified for the past four years and for the future as a standard drill which is regularly, easily, and economically performed and, once performed, avoids further problems, unclarities, or risks of reversible error. Not only are there no reported Florida appellate cases finding *Nixon II* error in any trial proceeding conducted since January 27, 2000, but there are no reported Florida appellate decisions in which trial proceedings conducted after January 27, 2000, have even been called into question under *Nixon II*.

4. The *Nixon II* prophylactic drill has become a standard feature of local Florida practice. *See* FLORIDA JURISPRUDENCE 2D §§ 1722 and 968 (Oct. 2003). It has been incorporated as a routine procedure by the Florida trial bar and judiciary. Florida judges and practitioners are

now habituated to using it; and—as has been the experience elsewhere under similar routine procedures[7]—it avoids troublesome appeals and post-conviction proceedings and the need to litigate constitutional issues. There is no good reason to upset this well-functioning Florida procedure now by reassessing the federal constitutional-law underpinnings of *Nixon II*, even if these were questionable.[8]

6. And there is a deeper reason not to do so. *Nixon II* marked no innovation in Florida criminal procedure or jurisprudence. Relying partly on the federal constitutional rule of *Boykin v. Alabama*, 395 U.S. 238 (1969), and partly on state law,[9] the Florida courts had earlier developed

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[7] For example, North Carolina—to which the Florida Supreme Court in *Nixon II* looked in fashioning its prophylactic drill—has operated under a similar routine procedure since 1985. *See State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985). It has become the standard practice in North Carolina criminal cases to conduct an on-the-record colloquy in which the defendant explicitly consents whenever defense counsel has in fact obtained the defendant's agreement to a concession of guilt and intends to proceed accordingly. *See, e.g., State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991); *State v. McNeill*, 346 N.C. 233, 485 S.E. 2d 284 (1997); *State v. Berry*, 356 N.C. 490, 573 S.E.2d 132 (2002); *State v. Perez*, 135 N.C. App. 543, 522 S.E.2d 102 (1999); *State v. Leggett*, 149 N.C. App. 977, 563 S.E.2d 310 [table] (2002); *cf. State v. Strickland*, 346 N.C. 443, 488 S.E.2d 194 (1997); *State v. Leeper*, 356 N.C. 55, 565 S.E.2d 1 (2002). As a result, claims of ineffective assistance of counsel based on concessions of guilt are easily and efficiently dispatched on direct appeal, with the appellate courts simply pointing to the on-the-record colloquy to show that the defendant consented to the concession.

[8] *Cf. Dickerson v United States*, 530 U.S. 428, 443 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture. *See Mitchell v. United States*, 526 U.S. 314, 331-332 (1999) (SCALIA, J., dissenting) (stating that the fact that a rule has found "'wide acceptance in the legal culture'" is 'adequate reason not to overrule' it)."). *See also Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992); *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992).

[9] The seminal opinion in *Koenig v. State*, 597 So. 2d 256 (Fla. 1992), to which we shall refer in text in a moment, relied on both

a standard procedure for explicit inquiry by the trial judge and an "affirmative showing" on the record of a criminal defendant's intelligent waiver of any basic trial right. This began with the right to plead not guilty—the subject of *Koenig v. State*, 597 So. 2d 256 (Fla. 1992), on which the court in *Nixon II* placed central reliance[10]—and was subsequently extended to other rights deemed fundamental in the Florida context, including some that have no federal constitutional grounding.[11] Such a devel-

Boykin and Florida Criminal Rule 3.172, set out in part in note 10 *infra*. *Id.* at 258.

[10] *See* 758 So. 2d at 624:

> In *Boykin v. Alabama*, 395 U.S. 238 . . . (1969), the Supreme Court held that a defendant may not enter a guilty plea unless that plea is intelligent and voluntary . . . . Consequently, this Court has stated that '[d]ue process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary.' *Koenig v. State*, 597 So. 2d 256, 258 (Fla. 1992). *See also* Fla. R. Crim. P. 3.172.

Florida Rule of Criminal Procedure 3.172 provides that before accepting a guilty plea, a trial judge must ensure that it is voluntary entered and that there is a factual basis for it. *See* Fla. R. Crim. P. 3.172(a). It further provides, in subsection 3.172(c):

> the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he or she understands: . . . ¶ (3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made and that the defendant has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to compel attendance of witnesses on his or her behalf, the right to confront and cross-examine witnesses against him or her, and the right not to be compelled to incriminate himself or herself.

[11] *See, e.g., Ashley v. State*, 614 So. 2d 486, 488 (Fla. 1993) (vacating a habitual-offender sentence on a guilty plea because the record did not affirmatively show that defendant personally knew his sentence could be lengthened due to the habitual-offender statute); *State v. Upton*, 658 So. 2d 86, 88 (Fla. 1995) (holding that a lawyer's written

opment, by which systematic state procedures are deployed to protect state-law and federal constitutional rights alike and to avoid the necessity for constant resort to adjudication of constitutional issues—like those which the State seeks to raise by its petition for *certiorari* here—are the hallmark of a healthy federalism and should be encouraged rather than undermined by this Court.[12]

waiver of jury trial on behalf of a client cannot validly waive the client's right to trial by jury where there is no affirmative showing in the record that the client agreed to the waiver); *Blair v. State*, 698 So. 2d 1210, 1213-14 (Fla. 1997) (reaffirming *Upton* in holding that a defendant can waive the right to a six-person jury if but only if the record shows an affirmative, personal, on-the-record waiver after adequate advice of the right); *Wallace v. State*, 722 So. 2d 913, 914 (Fla. App. 1998) (holding that a conviction following a lawyer's waiver of a six-person jury on behalf of his client could not be sustained under *Blair* because the record did not affirmatively show that the client was aware of his right to be tried by a jury of six and personally waived it); *Babb v. State*, 736 So. 2d 35, 36-37 (Fla. App. 1999) (reversing a conviction on a count on which defendant's lawyer waived a jury trial for the client because there was no affirmative showing in the record that the client made a knowing, voluntary, intelligent waiver of the right to trial by jury, as required by *Upton*); *Kelly v. State*, 797 So. 2d 1278, 1280 (Fla. App. 2001) (holding that defendant did not validly waive trial by jury because there was no affirmative showing in the record that he made a knowing, voluntary, intelligent waiver of the right as required by *Upton*). This practice has roots in state law preceding *Koenig*. *See LaMadline v. State*, 303 So. 2d 17, 20 (Fla. 1974) (reversing a death sentence because the record did not affirmatively show that defendant voluntarily, intelligently waived his right to a jury recommendation).

[12] Our federalism depends on a vital, ongoing dialogue between federal and state "courts equally bound to guard and protect rights secured by the Constitution." *Ex parte Royall*, 117 U.S. 241, 251 (1886). The role of the state judiciary in developing effective means to implement federal constitutional guarantees alongside parallel, partly overlapping state-law guarantees has been frequently recognized by this Court. *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 490-91 (1973); *Rose v. Lundy*, 455 U.S. 509, 515 (1982); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). Giving ample scope to that role reduces federal constitutional violations *ab initio*, federal constitutional claims *ex post*, and the burden placed upon the federal judiciary by both. *See* Harry T. Edwards, *The Rising Work Load and Perceived 'Bureaucracy' of the Feder-*

7. The petition for *certiorari* suggests that—putting Florida aside—a "conflict in the federal courts . . . respecting the interpretation of the per se rule of United States v. Cronic, 466 U.S. 648 (1984)] . . . is a valid basis for this Court to grant *certiorari* in this case." Petition for Certiorari, p. 25.[13] The purported "conflict" to which the

al Courts: A Causation-Based Approach to the Search for Appropriate Remedies, 68 IOWA L. REV. 871, 903-917 (1983). It also reduces the number of occasions when recourse must be had to federal constitutional adjudication—by any court, state or federal—on a case-by-case basis; and of course the "best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity," *Parker v. Los Angeles County*, 338 U.S. 327, 332 (1949); *see, e.g., Liverpool, New York & Philadelphia Steamship Co. v. Comm'r of Emigration*, 113 U.S. 33, 39 (1885). All of these considerations support the model of federalism reflected in Justice O'Connor's concurring opinion in *Cruzan v. Director*, 497 U.S. 261, 292 (1990), under which the "task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the States," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 . . . (1932) (Brandeis, J., dissenting), in the first instance."

[13] In the same sentence, the petition argues that "as well, the conflict between the decision of the Supreme Court of Florida and the Eleventh Circuit's . . . decision [in *Parker v. Head*, 244 F.3d 831 (11th Cir. 2001)] is a valid basis for this Court to grant certiorari. . . " Petition, p. 25. This submission reads the word "important" out of Rule 10 (b) and exemplifies the basic failing of the petition, which is to assume that *certiorari* is appropriate whenever a state court's decision of a federal question (without regard to its importance) is open to dispute. To be sure, if a federal circuit court of appeals in a habeas corpus proceeding *sustains* a recurring federal constitutional claim that has been *rejected* by the highest court of a state within that circuit, the resulting potential for discord may make the disputed question important on that very account. *See, e.g., Schirro v. Summerlin*, No. 03-526. But where a federal circuit court of appeals *rejects* a federal constitutional claim that is *accepted* by the highest court of a state within the circuit, the conflict is no more significant than if the highest court of any of the 50 States decided a federal issue inconsistently with any of the 12 federal circuit courts of appeals. Every such inconsistency could hardly be regarded as an occasion for *certiorari*; and where, as here, the issue which is the subject of the pretended inconsistency is *not* recurrent (*see* pages 7-9 *supra*) the case for *certiorari* is vacuous. (We say "pre-

petition adverts appears to be that the "Fifth and First Circuit Courts of Appeal [in 1997 and 1994 respectively] have criticized decisions of the Ninth and Tenth Circuits [in 1991 and 1988 respectively], concluding that these cases have misperceived the rationale underlying *Cronic*." (Petition, p. 23; *see* generally *id.* at pp. 22-25.) Even if a decade-old inter-Circuit conflict of this sort might, under some circumstances, warrant granting *certiorari* in a *state* case, it cannot do so here. For this Court has only recently decided three cases, *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *Mickens v. Taylor*, 535 U.S. 162 (2002); and *Bell v. Cone*, 535 U.S. 685 (2002), which together thoroughly explored and explicated the rationale and reach of *Cronic*, and there is no reason to suppose that the Court needs to revisit the subject a fourth time in four years in order to provide adequate guidance for the lower federal courts. To the contrary, any fair scan of recent Court of Appeals decisions demonstrates beyond question that the Court's delineation and restriction of the scope of *Cronic* in *Flores-Ortega*, *Mickens* and *Bell* have had a powerful, pervasive impact[14] that is uniform across the Circuits, *see, e.g., Ellis*

tended inconsistency" because, in fact, there is no conflict—let alone any "direct conflict" (Petition, p. 23)—between the Florida Supreme Court decision in *Nixon II* and the Eleventh Circuit decision in *Parker*. The Eleventh Circuit in *Parker* did not reach the merits of any constitutional claim; it merely held that the resolution of *Parker*'s claim by the Georgia courts was not unreasonable for purposes of federal habeas review under 28 U.S.C. § 2254(d)(1).)

[14] In *Haynes v. Cain*, 298 F.3d 375 (5th Cir. 2002), for example, the 5th Circuit *en banc* reversed a pre-*Bell* panel decision granting relief under *Cronic* (*Haynes v. Cain*, 272 F.3d 757 (5th Cir. 2001)), finding that "the Supreme Court clarified the scope of the second *Cronic* exception to *Strickland* in *Bell v. Cone*." 298 F.3d at 376. *See also Freeman v. Graves*, 317 F.3d 898 (8th Cir. 2003), and *United States v. White*, 341 F.3d 673 (8th Cir. 2003), both reversing, after *Bell*, pre-*Bell* district court decisions granting relief; *Ouber v. Guarino*, 293 F.3d 19, 32-33 (1st Cir. 2002), rejecting, after *Bell*, a district court's pre-*Bell* reliance on *Cronic*; and *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 970-72

v.United States, 313 F.3d 636 (1st Cir. 2002); *Solis v. United States*, 252 F.3d 289 (3rd Cir. 2001); *Glover v. Miro*, 262 F.3d 268 (4th Cir. 2001); *United States v. Jackson*, 327 F.3d 273 (4th Cir. 2003); *Johnson v. Cockrell*, 301 F.3d 234 (5th Cir. 2002); *Sherrod v. Tennessee*, 61 Fed. Appx. 936 (6th Cir. 2003); *United States v. Holman*, 314 F.3d 837 (7th Cir. 2002); *Headley v. Mueller*, 59 Fed. Appx. 188, 189 (9th Cir. 2003);[15] *Charm v. Mullin*, 37 Fed. Appx. 475, 480 (10th Cir. 2002);[16] *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000).[17]

CONCLUSION

A decision of the Florida Supreme Court on a subject so thoroughly and recently canvassed by this Court can have no conceivable impact outside Florida. Insofar as it invokes federal constitutional law, this particular decision of the Florida Supreme Court will have no future impact inside Florida, either. As Justice Frankfurter wrote

(N.D. Ill. 2002) reversing, on rehearing after *Bell*, the court's own pre-*Bell* reliance on *Cronic*.

[15] Headley argues that the California courts and the district court failed to apply the correct controlling authority by imposing Strickland' s requirement that he demonstrate prejudice rather than presuming prejudice under *Cronic*. But prejudice is very rarely presumed. The Supreme Court reiterated in *Bell v. Cone*, 535 U.S. 685 . . . (2002), that prejudice is presumed only '"if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing,"' *Bell*, 122 S.Ct. at 1851 (*quoting Cronic*, 466 U.S. at 659) (emphasis added in *Bell*). Headley's trial attorney did not entirely fail to challenge to prosecution's case.

59 Fed. Appx. at 189.

[16] "To be entitled to relief under *Cronic*, 'the attorney's failure must[, instead,] be complete.' *Bell v. Cone* . . . ." 37 Fed. Appx. at 480.

[17] The few cases that have applied *Cronic* since *Bell* have been limited to the first *Cronic* exception, involving the "complete denial of counsel" because counsel was absent during a critical stage of the proceeding, *Cronic*, 466 U.S. at 659. *See Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003); *French v. Jones*, 332 F.3d 430 (6th Cir. 2003).

for the Court on a relevant occasion, the "'[s]pecial and important reasons' [required to justify a grant of *certiorari*] imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). There are no non-academic, non-episodic reasons to justify *certiorari* or constitutional adjudication in the present case. The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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